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No. 77-225

In the Supreme Court of the United States

OCTOBER TERM, 1977

BARTHOLOMEW MANDEL AND HARRY THOMAS,
PETITIONERS

v.

CLIFFORD L. ALEXANDER, JR.,
SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners challenge the decision of the United States Army to separate them for cause from their civilian employment.

After having been warned by their supervisor of deficiencies in the performance of their duties, petitioners Mandel and Thomas were notified on March 22, 1973, and May 18, 1973, respectively, that the Army proposed to discharge them for numerous specific counts of inefficiency and failure to obey directions from proper authorities (Pet. App. 40, 47, 49, 56). Petitioner Mandel responded in person and in writing and was removed from service on May 23, 1973. Petitioner Thomas elected to respond only in writing and was removed on July 20, 1973.

Both petitioners appealed their dismissals to the Civil Service Commission. They were afforded post-discharge hearings and the removals were sustained by a field office of the Civil Service Commission (Pet. App. 42, 51). After careful consideration, the Appeals Review Board of the Civil Service Commission issued decisions affirming both dismissals and finding, in each case, that: (1) the dismissal had fully complied with applicable Civil Service procedural requirements, 5 C.F.R. Part 752 (Pet. App. 43, 52); (2) petitioners had failed to introduce any evidence to controvert the agency's specific charges of malfeasance, choosing instead to assert "affirmative defenses," and the hearing examiner's decision to affirm the dismissals was based on a fair preponderance of the evidence (Pet. App. 46-47, 55-56).[1] The Appeals Review Board rejected petitioners' claims that the agency improperly had failed to comply with the requirements of the Performance Rating Act and the Classification Act, 5 U.S.C. 4301 *et seq.* and 5101 *et seq.*, since the dismissals were not based on their performance ratings, which were satisfactory, but on specific charges of malfeasance (Pet. App. 43-44, 52-53). Similarly, the Board rejected petitioners' claims that the non-engineer supervisor who initiated the dismissal action was technically unqualified to criticize their performances, since the charges leading to dismissal included matters such as missed deadlines and attitudinal problems unrelated to technical competence (Pet. App. 47, 56).[2]

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[1]Separation of both petitioners had been ordered by the same supervisor and the charges and defenses in both cases were similar. Petitioners had hearings before the same examiner on May 13, 1974.

[2]The Appeals Review Board further explained that while petitioners were engineers, their work largely involved providing technical support for cost studies and that the supervisor, an economist with 25 years of supervisory experience, "was qualified to make judgments as to whether [petitioners'] work met the needs of the department, even assuming that he could not state whether one engineering technique was technically more sound than another" (Pet. App. 47, 56). The Board noted that petitioners had declined the opportunity to cross-examine the supervisor regarding his qualifications (Pet. App. 46, 55).

Prior to exhausting administrative remedies, both petitioners had filed suit in the United States District Court for the Eastern District of Michigan for damages and equitable relief against their supervisor and others. The district court dismissed the complaints and the court of appeals affirmed, holding that the damage claims were barred by sovereign immunity and rejecting petitioners' claims that they were entitled to pretermination hearings. *Mandel* v. *Nouse*, 509 F. 2d 1031 (C.A. 6), certiorari denied, 422 U.S. 1008. The court of appeals dismissed the remaining equitable claims for failure to exhaust administrative remedies (see Pet. App. 26). Several months later, the same district court dismissed a second and similar action brought by petitioners against the Secretary of the Army, on grounds of *res judicata* and failure to exhaust administrative remedies (see Pet. App. 26-27).

One month later, following exhaustion of their administrative remedies, petitioners jointly filed the instant suit in the United States District Court for the District of Columbia, again challenging the Army's failure to afford them a pretermination hearing as well as other aspects of their separations. The district court granted the government's motion to dismiss (Pet. App. 29). The court of appeals affirmed (Pet. App. 24-28).

The court of appeals correctly held that petitioners' procedural claims were barred, under the doctrine of

res judicata, by the rulings in the previous actions brought in Michigan, and that the Performance Rating Act had not been violated (Pet. App. 24-28).[3] Turning to petitioners' apparent challenge to their discharges as arbitrary or unreasonable, the court reviewed the decisions of the Appeals Review Board, which "canvas the evidence of inefficiency," and determined that those decisions were correct (Pet. App. 28).

Although petitioners renew their claims that their supervisor was incompetent to review their work (Pet. 9-10), that the agency did not comply with the Performance Rating Act (Pet. 10-12), and that dismissal was unjust (Pet. 12-13), these claims have been thoroughly litigated below and further review by this Court is unwarranted.

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.

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[3]As explained by the Civil Service Commission, petitioners' challenges under the Performance Rating Act were inapposite because, in each case, petitioners were "not removed due to an unsatisfactory performance rating, but rather for inefficiency and other reasons * * *" (Pet. App. 52; see Pet. App. 43).

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